

1416184 (Migration) [2015] AATA 3702 (19 November 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Phi Huynh Nguyen
VISA APPLICANT:	Mr Tan Duy Vu
CASE NUMBER:	1416184
DIBP REFERENCE(S):	2014026550
MEMBER:	Amanda Goodier
DATE:	19 November 2015
PLACE OF DECISION:	Perth
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 19 November 2015 at 4:51pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 July 2014 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 21 April 2014 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the parties were in a genuine and continuing relationship.
4. The review applicant appeared before the Tribunal on 31 July 2015 to give evidence and present arguments. The Tribunal also received oral evidence the review applicant's daughter Ngan (Nicky) Ngoc Gia Le and a friend, Trevor Harcombe.
5. The Tribunal during the hearing attempted unsuccessfully to contact the visa applicant on the telephone numbers provided to take evidence from him. Following the hearing the Tribunal was informed that the visa applicant was working and did not pick up his phone when called during the hearing. The Tribunal notes that the review applicant was advised in the hearing invitation that it may wish to take evidence from the visa applicant during the hearing and requested contact details. The hearing response provided to the Tribunal indicated that the visa applicant would be participating in the hearing, providing his contact details.
6. A submission was received prior to hearing addressing concerns raised by the delegate with a further submission provided after the hearing addressing concerns raised by the Tribunal. The review applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all

others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The review applicant provided a copy of her marriage certificate indicating that her marriage to the visa applicant was registered in Vietnam on 17 December 2013. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
11. The applicants applied for this visa on 21 April 2014 which was refused by the delegate on 22 July 2014. The delegate was not satisfied the parties were in a genuine relationship based on inconsistencies in their responses during their interview with the delegate as well as a lack of information supporting their relationship.

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

12. Financial aspects of the relationship

13. The review applicant indicates she owns her own home. She indicates she is employed in a bakery on a full-time basis 7 days a week from 8am to 2pm. She was employed at St George Patisserie in Pinjarra from October 2014 and previously was employed at Waikiki Patisserie and Café. Until 2012 she worked for her sister who also owns a bakery but now works for her cousin.
14. The visa applicant lives with his family and has been employed as a driver since January 2014 earning VND 2,900,000.
15. The review applicant provided copies of transfers of funds to the visa applicant dated 11 November 2013, 25 and 27 March and 10 April 2014 totalling AUD\$7,700-. On the 17 April 2014 the visa applicant paid the partner visa application fee of around AUD\$3500 or VND 65,281,000-.
16. The review applicant and visa applicant opened a joint ANZ Bank account on 14 May 2015 into which the review applicant deposited VND 5,000,000 or AUD\$300-, which is after the refusal of the visa by the delegate. No statements were provided indicating use of the account for the pooling of financial resources or sharing of day to day expenses.
17. It was submitted that when the review applicant is in Vietnam she regularly pools her money with the visa applicant and they buy their groceries together but as all payments are in cash there is no proof. The Tribunal does not accept that the buying of groceries for the short period the review applicant stays with the visa applicant's family is evidence of a pooling of financial resources or sharing of day to day expenses.
18. It was submitted that the visa applicant treated his wife to a short holiday in May 2015 and they spent 2 nights in Thanh Nam Hotel together. However the Tribunal does not accept that this is evidence of a pooling of financial resources or sharing of day to day finances.

19. Evidence was provided indicating that the review applicant sends money to her husband but the Tribunal is not satisfied that sending money to her husband on 4 occasions prior to the lodging of this application indicates a pooling of resources or sharing of day to day finances.
20. The review applicant indicated that they have agreed to share their finances. However, based on the evidence provided, the Tribunal is not satisfied that there is a pooling of financial resources or sharing of day to day expenses.

21. *Nature of the household*

22. The review applicant indicates in her Form 40SP that she lives in Australia in her home with her 3 children. The visa applicant indicates that he resides in the family home with his mother and siblings in Vietnam.
23. It was claimed that the review applicant mostly stayed at the visa applicant's home during her visit from 8 to 24 April 2013. In submissions provided to the Tribunal it was claimed a temporary household registration for the period 6 to 17 October 2013 was included and it was claimed that the review applicant resided at the visa applicant's home during this time. A copy of a temporary household registration for the period 7 October to 6 November 2013 was provided for a Le Thanh Phuc Loc, male, date of birth 11 December 1997 (the review applicant's son). The review applicant provided a temporary registration for the visa applicant's home for the period 3 to 6 January 2014. A foreigner's stay form was provided for the visit by the review applicant for the period 11 to 23 May 2015.
24. The Tribunal does not accept that the temporary household registrations do anything more than indicate the review applicant stayed at that particular house. While the temporary registrations are valid for a period, they do not indicate the length of time the review applicant actually stayed in the particular property.
25. The review applicant told the Tribunal that when she travelled to Vietnam with her son and Mr Harcombe they stayed with the visa applicant in his house, giving the address which was the same as that given on her son's temporary household registration for that period. Also present were the visa applicant's mother, brothers and family members. She stated she always stays in the visa applicant's home and stayed with him for the 2 weeks in October 2013.
26. It was claimed during the times the review applicant stayed with the visa applicant, she shared responsibility for household tasks and cooking. It was submitted that the review applicant would cook meals with the visa applicant's mother during the times she stayed with them and would regularly contribute and share the household tasks.
27. While there is evidence indicating the parties have spent short periods of time together since their marriage, they live in two different countries, have not lived together for any length of time or had the opportunity to establish a household together. Therefore the Tribunal places little weight on this factor.

28. *Social aspects of the relationship*

29. A Form 888 dated 14 June 2015 was provided from Trevor Harcombe indicating that he was a friend of the review applicant and travelled to Vietnam with her in October 2013 where he met the visa applicant. He believes it is a genuine relationship. He also gave evidence at the hearing and provided additional information following the hearing.
30. A selection of photographs were provided of the review and visa applicant together as well as with Mr Harcombe, with various family members including the visa applicant's mother as

well as photographs of them with the review applicant's uncle and daughter when he collected her from the airport. A number of photographs of their wedding were provided.

31. The review applicant told the Tribunal about 70 to 80 people attended their wedding in January 2014. All the visa applicant's family and friends attended. She told the Tribunal that no-one from her family attended. When asked why her sister who lived in Vietnam did not attend, the Tribunal was told that she was away in Malaysia for business at the time and when asked about her aunty that lived close to the visa applicant, she responded that she had returned to Australia. The review applicant indicated that all her family lived in Australia and she decided there would be another celebration when the visa applicant arrived in Australia. The Tribunal asked wasn't it important for her to have a family member attend and was told that she did not plan to have a wedding ceremony and was advised to have a ceremony so she just presented herself. The Tribunal put to her that culturally it was important for her to have a family member attend the wedding ceremony with the review applicant responding yes, but she planned to have a wedding ceremony in Australia.
32. The evidence indicates that the review applicant's children are aware of their mother's marriage to the visa applicant.
33. From the evidence given there appears to be family recognition of the marriage between the review applicant and the visa applicant. While the photographs of the review and visa applicant show them together at various places and receipts have been provided to indicate they had a brief holiday together in May 2015, there is very little other evidence to support the parties planning and undertaking social activities while they are in Vietnam together.

34. *Nature of persons commitment to each other*

35. The review and visa applicants provided statements to the Tribunal indicating that in 2010 the review applicant visited Vietnam with the intention of touring and presenting to the visa applicant a gift the visa applicant's close friend had asked her to deliver. They met and got to know each other. They confided in each other and the review applicant returned to Australia on 24 October 2010. They maintained contact after she had returned to Australia. In September 2011 the review applicant returned to Vietnam and they spent time together. The visa applicant took the review applicant to the airport on 3 October 2011 and they maintained their contact by telephone. On 8 April 2013 the review applicant returned to Vietnam and the visa applicant collected her from the airport. On the day after her arrival the visa applicant told the review applicant he loved her. On 10 April the visa applicant took the review applicant to his house and this is the first time she met his family. On 15 April 2013 the visa applicant told her he loved her and she responded positively before returning to Australia where they maintained contact by telephone. On 6 October 2013 the review applicant returned to Vietnam with her son and close friend. They visited many places together and they prepared the necessary paperwork for their marriage. On 14 October 2013 they went to register their marriage before the review applicant returned to Australia. Their marriage was registered 17 December 2013 and they were issued a certificate. The review applicant returned to Vietnam on 3 January 2014 for 3 days for the wedding ceremony. On 11 May 2015 she returned to Vietnam to spend time with her husband and they visited many places together.
36. The Tribunal asked the review applicant about Quang and how she knew him. The review applicant told the Tribunal that he lived in Bunbury and she was working for her sister in Kwinana. She does not know his full name but they were acquaintances. He came to Mandurah to visit his siblings and they met in 2010. She had only met him once and he asked her to take a gift to the visa applicant and she agreed. His relative worked in the bakery as well and that is why she agreed to take the gift. They did not keep in contact but she claimed to have seen him about 5 to 6 months ago. When asked how the visa applicant

knew Quang, the review applicant stated they were from the same village which was about 160kms away from her village. Her aunty lives in Bin Hoa which is not far from where the visa applicant lives.

37. It was submitted that due to work commitments the review applicant was unable to visit Vietnam to spend time with her husband from January 2014 until May 2015 as she changed jobs in November 2014.
38. It was submitted that they keep in contact with each other through telephone calls and messaging. The Tribunal was provided with copies of a selection of FaceTime calls between the review and visa applicants. The earliest was November 2014, with the majority in 2015. It was submitted that due to software updates only some of the data remains.
39. At the hearing Mr Harcombe stated that he stayed in the visa applicant's house, there was no-one else living in the house except a young woman like a flat mate and he stayed about 4 weeks. The Tribunal confirmed his response as to who else was staying with him at hearing. He met the review applicant through the shop and back in the early days he would see her every day. They have been friends for some time. The review applicant asked him to go with her to Vietnam. They went out and travelled everywhere and enjoyed the country. He stated the visa applicant was a genuine person, caring, good natured and a hard worker. They went out on day trips and meals. He did not take any photographs. He told the Tribunal he did not know a Graeme Richardson. He was married on 15 March 2014 to a young woman he met while in Vietnam.
40. The Tribunal put to the review applicant the inconsistencies in Mr Harcombe's evidence with her earlier evidence pursuant to the provisions of s359AA. In response she stated that her husband paid someone to clean up and do the house duties. Mr Harcombe stayed in the visa applicant's aunt's house close to the visa applicant's home. She added that Mr Harcombe was hardly there anyway as his girlfriend lived near her husband's home. She added that his girlfriend is a relative and neighbour of the visa applicant, they liked each other and are already married and she is in Australia. She also stated they only stayed 2 weeks and maybe he was mistaken in the length of time he stayed. The Tribunal indicated that the household registration indicated that she stayed at her husband's house and now she was saying that she stayed at another house as there was not enough room in the visa applicant's home.
41. The Tribunal asked why their temporary registration showed the address of the visa applicant when they stayed at another address and was told because that is what they had to do as that was the visa applicant's address.
42. Following the hearing Mr Harcombe provided a letter stating that he only stayed for 11 days and not 4 weeks as stated during the hearing. He also stayed with the review applicant and her son as well as the visa applicant in the visa applicant's aunt's house along with another lady who did the housekeeping. This house is close to the visa applicant's home and they would spend their time together at the visa applicant's home as well as go out to visit places and eat meals together.
43. The Tribunal referred to the claims and submissions that each time she visited Vietnam she stayed with the visa applicant, his mother and his family and shared the housework and cooking. The review applicant responded that she did that in May 2015.
44. The Tribunal accepts on the basis of the evidence presented that Mr Harcombe only stayed 11 days in Vietnam.

45. It was submitted that the visa applicant picked up the review applicant's daughter from the airport to take to her hotel on 21 June 2014. They spent about 20 minutes together. The review applicant's daughter provided a further statement after the hearing indicating that she was mistaken that Mr Harcombe was a friend of her mother's second husband, Graeme Richardson, as this was an interpretation error between her and her mother. She also confirmed that the visa applicant collected her from the airport and they spent 20 minutes together. She also confirmed that the visa applicant's niece lived with her family for about 12 months while studying in Australia. The visa applicant's niece provided a statement confirming that during 2013 she stayed with the review applicant who took care of her and treated her like an aunt.
46. The Tribunal asked the review applicant to tell it about her relationship with her husband, for example what kind of relationship she has with her husband. The review applicant started restating her written statement. The Tribunal asked question again and eventually was told that she loved him and he loved her.
47. The Tribunal was unable to speak to the visa applicant about his relationship during the hearing and this was despite giving notice that it wished to take evidence from him.
48. The Tribunal is concerned about inconsistencies in the evidence provided. The review applicant provided copies of household registrations indicating that she stayed at the visa applicant's home on several occasions. However the initial evidence from Mr Harcombe was that he stayed in a house where there was just another person, like a flatmate. The review applicant stated initially that she stayed with the visa applicant and his family. The Tribunal was later told that they stayed at the visa applicant's aunt's house with Mr Harcombe later submitting that he also stayed in the aunt's home with the review and visa applicants as well as the review applicant's son. The review applicant told the Tribunal that Mr Harcombe was hardly there as he was with his girlfriend yet the Tribunal was also told that they all spent time together travelling around and having meals together.
49. When asked why the visa applicant's address was on the temporary registration rather than the address at which they stayed, the review applicant stated that she had to as that was his address.
50. It was also claimed and submitted that the review applicant stayed with the visa applicant and his family each time she visited Vietnam. However when referred to the claims that she shared the housework and cooked when staying with her husband and his family, the review applicant responded that was in May 2015. The Tribunal finds the applicant's comments casts doubt on the claims to have stayed regularly in the visa applicant's house and together with the inconsistencies in Mr Harcombe's evidence with that of the review applicant, the Tribunal is not satisfied that the review applicant regularly stayed with the visa applicant. The Tribunal also has concerns with the review applicant's response that the household registration had the visa applicant's address on it because that was what they had to do. It appears from these comments that the household registration was obtained solely to claim that the review applicant stayed with the visa applicant. After considering the evidence, the Tribunal is not satisfied the review applicant stayed with the visa applicant each time she visited Vietnam.
51. The Tribunal finds the review applicant's response when asked about her wedding does not indicate a commitment to the relationship. She told the Tribunal that she was advised to have a ceremony so she just presented herself. The Tribunal does not accept that this is the behaviour of a person in a new relationship with someone she claims to love and he loves her.

52. The Tribunal is also not satisfied on the evidence provided that the despite claiming to have a detailed conversations by electronic means for over 2 years and having spent time together each time the review applicant returned to Vietnam, they have the knowledge of each other one would expect in a relationship of over 2 years and one where they claim to have been communicating regularly since 2010 when they first met.
53. The Tribunal was told and it was submitted that the parties maintain contact by telephone and have done so since 2010 when they first met. However apart from a sample of screenshots for November and December 2014 as well as a few for the early part of 2015 no other records of telephone or electronic communication was provided. The Tribunal does not accept the submission that due to software updates only some of the data remains. There are other records other than screenshots that can be provided and the Tribunal finds that the failure to provide any other records causes the Tribunal to doubt that there was regular communication between the parties.
54. When asked about her relationship with her husband, the review applicant was only able to tell the Tribunal that she loved him and he loved her. For a person claiming to be in regular contact with her husband and claiming that contact has been since 2010, the Tribunal finds the review applicant's inability to say anything more than she loves him indicates a superficial knowledge and not what would be expected from someone claiming to have been in such regular contact that a close and intimate relationship developed and was maintained.
55. The Tribunal does not accept as plausible that the review applicant would take a gift from a person she had just met and had only met on one occasion, does not know his full name or where he lives apart from Bunbury, but claims he was related to a person she worked with, to deliver to an unknown person in Vietnam. When asked why she would travel 160kms from her village to deliver a gift, the review applicant stated her aunty lived near there.
56. It was submitted that the visa applicant's niece residing with the review applicant for 12 months indicated the degree of trust and commitment between the parties at this time. The Tribunal does not accept that the visa applicant's niece staying with the review applicant is evidence of any degree of trust and commitment between the parties because the Tribunal does not accept on the evidence presented that the parties have a mutual commitment to a shared life together.
57. After considering all the available evidence, the Tribunal is not satisfied that the review applicant and the visa applicant have a mutual commitment to a shared life together.
58. While the Tribunal accepts that people marry for many reasons and that marrying to obtain a visa does not necessarily mean that there is not a mutual commitment to the relationship, in these particular circumstances, the Tribunal is not satisfied after considering the evidence in totality that the review and visa applicants have a mutual commitment to a shared life together.
59. The Tribunal is not satisfied after considering the available evidence that the review and visa applicants have a mutual commitment to shared life to the exclusion of others, the relationship is genuine and continuing and they live together or not separately and apart on a permanent basis.
60. Given these findings the Tribunal is not satisfied that at the time the visa application was made the parties were in a spousal relationship. Therefore the visa applicant does not meet cl.309.211.
61. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

62.

DECISION

63. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Amanda Goodier
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).